Supreme Court, U.S.
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No.

In the Supreme Court

OF THE

United States

JUNE TERM, 1995

TIMOTHY L. STERN,
Petitioner,

v.

DONNA E. SHALALA, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, and her delegate, JUNE GIBBS BROWN, INSPECTOR GENERAL,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTION PRESENTED

1. Is a petitioner entitled to attorney's fees under the Equal Access to Justice Act when a United States Court of Appeals reduces damages imposed by an administrative law judge by over 80 percent, on the basis of a theory propounded by the petitioner, and accordingly "affirms" the agency's decision "as modified."

LIST OF PARTIES IN THE PROCEEDING IN THE COURT OF APPEALS FOR THE SECOND CIRCUIT

The parties to the proceedings below were Timothy L. Stern, Petitioner, and Donna E. Shalala, Secretary of the United States Department of Health and Human Services, and her delegate, Bryan B. Mitchell, Principal Deputy Inspector General, Respondents.

June Gibbs Brown has been substituted for Bryan B. Mitchell in this Petition for a Writ of Certiorari, because Ms. Brown has become Inspector General and Mr. Mitchell no longer holds the post of Deputy Inspector General.

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	vii
OPINIONS BELOW	1
JURISDICTION	2
STATUTORY PROVISIONS INVOLVED	2
STATEMENT OF THE CASE	3
Equal Access to Justice Act	3
Background	6
The EAJA Application	20
The Government's Argument	24
The Second Circuit Decision	27

TABLE OF CONTENTS
(Continued)

Page

REASONS FOR GRANTING THE WRIT 27

I

THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO ARTICULATE NECESSARY STANDARDS FOR DETERMINING "PREVAILING PARTY" STATUS AND WHETHER THE GOVERNMENT'S POSITION LACKS SUBSTANTIAL JUSTIFICATION, FOR PURPOSES OF GRANTING OR DENYING AN AWARD OF ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT, IN CIRCUMSTANCES WHERE A COURT HAS SUBSTANTIALLY REDUCED DAMAGES AWARDED BY AN ADMINISTRATIVE AGENCY AGAINST THE PETITIONER OR HAS OTHERWISE SUBSTANTIALLY MODIFIED A DETERMINATION OF THAT AGENCY ADVERSE TO THE PETITIONER 27

TABLE OF CONTENTS
(Continued)

Page

II

THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION OVER THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BECAUSE OF THAT COURT'S DENIAL OF DR. STERN'S EAJA APPLICATION WITHOUT OPINION, UNDER FACTS INDICATING A HIGH IMPROBABILITY THAT THAT COURT COULD HAVE DENIED AN AWARD OF SUCH FEES WITHOUT SUBSTANTIALLY MODIFYING ITS OWN PRECEDENT 42

CONCLUSION 47

TABLE OF CONTENTS
(Continued)

APPENDIX A - Final Decree of the United States Court of Appeals for the Second Circuit

APPENDIX B - Opinion of the United States Court of Appeals for the Second Circuit in *Stern v. Shalala*, 14 F.3d 148 (1994)

APPENDIX C - Statutory Provisions

APPENDIX D - Transcript of Oral Argument Held December 10, 1993 Before Newman, Chief Judge, Oakes and Cardamone, Circuit Judges (Argument of the Government)

TABLE OF AUTHORITIES

CASES

Page

Ardestani v. I.N.S., 112 S.Ct. 515 (1991) 28

Commissioner, INS v. Jean, 496 U.S. 154 (1990) 27, 31

Environmental Defense Fund, Inc. v. Watt, 722 F.2d 1081 (2nd Cir. 1983) 33

Green v. Bowen, 877 F.2d 204 (2nd Cir. 1989) 21, 33-35, 43, 44

Pierce v. Underwood, 108 S.Ct. 2541 (1988) ... 29, 30

Shalala v. Schaefer, 113 S.Ct. 2625 (1993) 28

Stern v. Shalala, 14 F.3d 148 (1994) ..... vi, 6

Sullivan v. Hudson, 109 S.Ct. 2248 (1989) 4

Texas State Teachers Association v. Garland Independent School District, 109 S.Ct. 1486 (1989) 21, 34-36, 42

TABLE OF AUTHORITIES
(Continued)

STATUTES

Page

5 U.S.C. § 504 ..... 3, 5

28 U.S.C. § 1254(1) 2

28 U.S.C. § 2412 ..... 2, 3

28 U.S.C. § 2412(d)(1)(A) 2, 4, 5, 20

28 U.S.C. § 2412(d)(3) 4

42 U.S.C. § 1320a-7 8

42 U.S.C. § 1320a-7a 3, 8

42 U.S.C. § 1320a-7a(e) 12

42 U.S.C. § 1988 34

The petitioner, Timothy L. Stern ("Dr. Stern"), respectfully prays that a writ of certiorari issue to review the final decree of the United States Court of Appeals for the Second Circuit (the "Second Circuit"), entered in this action on March 20, 1995, denying petitioner's application for attorney's fees under the Equal Access to Justice Act.

OPINIONS BELOW

The Second Circuit's final decree on Dr. Stern's application for attorney's fees under the Equal Access to Justice Act (the "EAJA") is reprinted as Appendix A. There was no opinion issued by the Second Circuit.

The opinion of the Second Circuit in the underlying appeal from the decision of the administrative law judge, in which the Second Circuit vacated substantial penalties which had been imposed against the petitioner, is reported at 14 F.3d 148 and is reprinted in Appendix B.

JURISDICTION

The Second Circuit entered its final decree on March 20, 1995 and denied Dr. Stern's timely application for attorney's fees under the EAJA.

Dr. Stern invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This action involves the Equal Access to Justice Act, 28 U.S.C. § 2412. In particular, this action involves 28 U.S.C. § 2412(d)(1)(A), which provides:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States in any court having jurisdiction of that

> action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

28 U.S.C. § 2412 is reprinted, in its entirety, in Appendix C, page C-1. This action also involves 5 U.S.C. § 504, reprinted in Appendix C, page C-7 and the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, reprinted in Appendix C, page C-13.

STATEMENT OF THE CASE

Equal Access to Justice Act

This Court has stated that the Equal Access to Justice Act ("EAJA") was passed by Congress in response to its concern that persons may be deterred from seeking review of, or defending against, unreasonable governmental action because of the expenses involved in securing the

vindication of their rights. *Sullivan v. Hudson*, 109 S.Ct. 2248, at 2253 (1989).

28 U.S.C. § 2412(d)(1)(A) provides that, except as otherwise specifically provided by statute, a court shall award to the prevailing party, other than the United States, fees and other expenses incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency action, brought by or against the United States, unless the court finds that the position of the United States was substantially justified or that special circumstances make the award unjust.

28 U.S.C. § 2412(d)(3) further provides that in awarding fees and other expenses to a prevailing party in any action for judicial review of an adversary adjudication, a court shall also include the fees and expenses of the pre-

vailing party incurred in the administrative proceeding below, to the extent authorized by subsection (b)(1)(C) of 5 U.S.C. § 504. That section, in turn, provides for the same criteria as set forth in 28 U.S.C. § 2412(d)(1)(A), namely for the recovery of fees and expenses by the prevailing party unless the position of the agency was substantially justified or unless special circumstances would render such an award unjust.

On January 20, 1995, Dr. Stern submitted a timely application under the Equal Access to Justice Act to the Second Circuit for attorney's fees in the amount of $141,666.00, and for other expenses (namely disbursements) in the amount of $6,930.87, incurred in his defense in administrative proceedings and on review of the administrative decision by the Second Circuit. This application was denied, without opinion, on March 20, 1995.

Background

The following underlying facts are taken, for the most part, from the opinion of the Second Circuit, in its review of the administrative proceeding below, *Stern v. Shalala*, 14 F.3d 148 (1994), reprinted in Appendix B; and are otherwise undisputed in the record.

Prior to July of 1987, Dr. Stern was a licensed physician in the State of New York. In January of 1986, a federal grand jury returned a multi-count indictment against Dr. Stern, including several counts of mail fraud, for submitting false claims to Medicare, as well as a separate multi-count indictment for the unlawful distribution of codeine to himself. In July of 1987, pursuant to a plea agreement with the United States, accepted by the federal district court for the Western District of New York, Dr. Stern pled guilty to one count of mail fraud, encompassing

seven false Medicare claims, and to one count of unlawful distribution of codeine to himself. As one of the conditions of his plea agreement, Dr. Stern surrendered his license to practice medicine.

As another condition, the plea agreement provided that Dr. Stern would make restitution to his patients who submitted verifiable claims that Dr. Stern had misled them into believing their claims would be reimbursed by Medicare, in an amount no less than $5,000 and no more than $110,000. [Dr. Stern ended up being required to pay restitution of $11,000.]

Of particular relevance, the plea agreement further provided that "Claims of the Medicare program [i.e. any claims by the Government, as opposed to claims by patients] will be determined in a separate civil proceeding

and will not be part of the restitution ordered by the Court."

On January 18, 1989, the Inspector General of HHS issued a Notice of Determination informing Dr. Stern that the Inspector General was initiating proceedings under the Civil Monetary Penalties Law, 42 U.S.C. § 1320a-7a, seeking an assessment of $70,648, penalties of $425,250, and exclusion of Dr. Stern from the Medicare program for twenty years.[1] This Notice of Determination followed very shortly after the conclusion of a prior administrative proceeding which the Inspector General had initiated in 1988 under a companion statute, 42 U.S.C. § 1320a-7, providing for the mandatory exclusion from Medicare of a participating doctor who has been convicted of Medicare fraud.

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[1] By amendment to its Notice of Determination, in November of 1989, the Government increased its proposed exclusion from Medicare to thirty years.

In the prior proceeding, the Government had sought a twenty-year exclusion of Dr. Stern from Medicare, but ALJ Medici, after finding that Dr. Stern had not defrauded Medicare, but that there was merely a "legitimate difference of opinion" between him and the Government, had confined Dr. Stern's exclusion to the required minimum five-year period.

The Civil Monetary Penalties Law ("CMPL"), at issue in the second administrative proceeding initiated by the Inspector General on January 18, 1989, provides that where a practitioner submits claims to Medicare for services which he knows, or should know, were not provided as claimed, the Inspector General may impose "assessments" of up to twice the amounts claimed by the doctor from Medicare and penalties of up to $2,000 per claim submitted by the offending doctor. The penalties and

assessments, forming the basis for the Notice of Determination of the Inspector General under the CMPL, derived out of 567 claims by Dr. Stern, between 1983 and 1986, claiming reimbursements totalling $35,324, upon which the Government made over-payments to Dr. Stern in the amount of $9,000.

The CMPL administrative proceeding continued until the final decision of the Department of Health and Human Services was rendered on March 16, 1993. In that decision, Dr. Stern was found liable for $70,648 in assessments, $345,000 in penalties, and was excluded from the Medicare program for 10 years.

In the administrative proceeding (as well as in the petition for review to the Second Circuit), the Petitioner made numerous arguments in support of his position that the imposition of the penalties and assessments, and Medi-

care exclusion, were improper. These arguments included the argument that the terms of the plea agreement in the 1987 criminal proceedings precluded the imposition of penalties by the Inspector General, that the proceedings were barred by the res judicata and collateral estoppel effects of the prior administrative proceeding before ALJ Medici in which the Petitioner's exclusion from Medicare had been reduced from twenty years to the mandatory minimum of five years under the statute applicable in that proceeding, that the proceedings by the Inspector General were not authorized by the Attorney General of the United States as required by statute, and that the imposition of extensive penalties violated Petitioner's freedom from double jeopardy, in view of the previous criminal conviction on an Indictment alleging the very same pattern of conduct during the same years.

On May 12, 1993, a Petition for Review was filed with the Second Circuit to review the final determination of the Secretary of Health and Human Services. The jurisdiction of the Second Circuit was invoked pursuant to 42 U.S.C. § 1320a-7a(e).

Oral argument was held on December 10, 1993; and on January 11, 1994, the Second Circuit rendered its decision. In its decision the Second Circuit struck the penalties. It stated: "As modified by the elimination of the $345,000 in penalties, the decision requiring payment of $70,648 in assessments is affirmed." (Decision, page 1015). The Second Circuit did not mention the ten-year exclusion from Medicare, and *sub silentio*, therefore, left it intact.

The Second Circuit based its reversal of the penalties, constituting well over 80% of the totality of the monetary exactions, on the grounds that the imposition upon Dr.

Stern of penalties by the Government constituted a violation of the government's plea agreement with Dr. Stern, as reflected in the demonstrated understanding of both Dr. Stern and the prosecution at the time the plea agreement was made.

The Second Circuit also stated that "Petitioner presents a substantial argument that the imposition of penalties based on a finding of scienter is barred by the collateral estoppel effect of the prior administrative determination [one year earlier by ALJ Medici] that there was a 'legitimate difference of opinion' whether Stern's services were reimbursable." However, the Court indicated that it was not necessary to resolve that contention because the penalties were precluded in any event by the plea agreement. (Decision, page 1013).

In vacating the penalties on the basis of the plea agreement entered in the criminal proceedings, the Second Circuit was unequivocal in its analysis. The Second Circuit noted that while the written plea agreement simply provided that "Claims of the Medicare program will be determined in a separate civil proceeding" (and thus reserved the right of the government to proceed civilly at a later time), "this provision was given further meaning during the plea allocution." (Decision, page 1013).

In the allocution, as analyzed by the Second Circuit, the Assistant United States Attorney specifically informed the defendant and the district Court that "'an additional one hundred ninety thousand dollars which the Medicare program alleges they lost in this will be handled in a separate civil proceeding and will not be part of the disposition of the case.'" Emphasis added. (Decision, page 1014).

The Second Circuit specifically noted, "There was no mention of any remaining dispute concerning civil penalties." (Decision, page 1014).

The Second Circuit further noted that no less than two weeks after the plea agreement, the prosecutor wrote to the Inspector General, confirming Dr. Stern's understanding that the plea agreement permitted the Government to proceed civilly only to recoup its actual losses. Nevertheless, according to the Second Circuit, the prosecutor urged the proposed switch to a penalties action as "'more appropriate'" and "'much easier.'" (Decision, page 1014).

The Second Circuit then stated that "Courts enforce what 'the defendant reasonably understood' the plea agreement to mean when the guilty plea was entered," cit-

ing numerous cases. (Decision, page 1014). It concluded by stating:

> In the pending case, the plea agreement left "[c]laims of the Medicare program" open for determination in a later "civil proceeding," and the defendant understood those claims to be actual losses alleged to total no more than $190,000. That understanding was articulated by the District Judge and shared by the prosecutor until he decided that it would be "much easier" to pursue a claim for penalties. Under these circumstances, the collection of penalties in the amount of $345,000 was barred by the plea agreement, and these penalties must be stricken from the agency's decision.

(Decision, page 1015).

The Second Circuit's determination that there was no substantiality or justifiable basis for the Government's position as to the plea agreement was further evidenced at oral argument. The Petitioner has transcribed the oral argument from an audio tape provided by the Clerk of the Court and has attached the Government's oral argument

as Appendix D. The following colloquy took place between Mr. Hoyle, representing the Government, and Chief Judge Newman (see Appendix D, page D-18):

> Judge Newman [referring to the letter written by the prosecutor to the IG two weeks after the plea agreement]: "And then, and then you got this letter from the government, Mr. Geraci or Garache, who handled the plea, right?"
>
> Mr. Hoyle: "Yes, Your Honor, yes, that's correct."
>
> Judge Newman: "And he says, "Timothy Stern understands that Medicare will initiate a civil action against him to recover approximately $190,000."
>
> Mr. Hoyle: "I think what he's indicating is that that's one of the possible civil proceedings."
>
> Judge Newman: "Oh, is that what he's saying that this is one of them?"
>
> Mr. Hoyle: "Well, in the very next sentence, the very next paragraph, he begins talking about the civil monetary penalties."

Judge Newman: "Yeah, he says, he says, the first sentence says, that's what Timothy Stern understands, the fellow who pled. Then, the government says, it would be more appropriate for us to go after him a little heavier."

Mr. Hoyle: "Well, I think that all the plea agreement says is civil proceeding. Certainly at the time..."

Judge Newman: "And the question is what was that fairly understood by the parties who had to tender the plea."

Mr. Hoyle: "Right."

Judge Newman: "And now we got the government's own statement how it was understood by Dr. Stern."

Mr. Hoyle: "I don't think that the AUSA intended to say that that's the only thing that Dr. Stern understood. At the time it certainly had, was known in the Medicare community certainly, that the civil monetary penalties proceeding is a widely used proceeding."

Judge Newman: "You think that this is just a 'for instance.' He's just writing the IG: "Among the things in Dr. Stern's mind is this loss, is this actual loss."

> Mr. Hoyle: "I, I think that he's saying that there were really two primary possibilities here. A sort of a restitution suit for the $190,000. Let me say that $190,000 was just a rough estimate that the initial investigation...."
>
> Judge Newman: "I understand. But it focuses on actual loss rather than penal sum. That's the key point."
>
> Mr. Hoyle: "That's correct, Your Honor. But I, I think that what the U.S. Attorney, the AUSA, is saying is there are two primary possibilities here. One is essentially a restitution suit, civil suit. And the second is a proceeding under the civil monetary penalties law."
>
> Judge Newman: "And he says Dr. Stern understands one of them. But, but I, the government think it ought to be the other."

Shortly thereafter, when Judge Newman was questioning Mr. Hoyle with reference to the allocution, in which the Assistant United States Attorney indicated that "there are still disputed claims in the amount of $190,000 which involved a separate civil case and that is not

involved in this plea agreement," the following colloquy took place (see Appendix D, page D-26):

> Judge Newman: "It didn't say $190,000 or maybe a couple hundred thousand more. He said $190,000."
>
> Mr. Hoyle: "Well, I think that's correct, Your Honor, and the $190,000 is the amount that they were estimating that was lost, and I think the question is...."
>
> Judge Newman: "That's the point. Doesn't that indicate that what everyone in that courtroom understood was being left for the future was the amount of the loss?"

The EAJA Application

In his application to the Second Circuit for EAJA fees, Dr. Stern argued that he had satisfied the requisites of the statute, namely that he was a "prevailing" party within the meaning of 28 U.S.C. § 2412(d)(1)(A) and that the position of the United States on the issue decided by

the Second Circuit, namely the effect of the plea agreement on the right of the Government to impose penalties, was not substantially justified.

Dr. Stern asserted that under the standard for "prevailing party" enunciated by the Supreme Court in *Texas State Teachers Association v. Garland Independent School District*, 109 S.Ct. 1486 (1989), in regard to attorney's fees applications under the Civil Rights Attorney's Fees Awards Act of 1976, which standard was applied by the Second Circuit to actions under the Equal Access to Justice Act in *Green v. Bowen*, 877 F.2d 204 (2nd Cir. 1989), the Petitioner did not have to score a 100% victory on all issues in order to be considered a prevailing party. Dr. Stern argued that he was entitled to "prevailing party" status because he was successful in securing the reversal of the large bulk of the amounts which had been determined

against him by the Secretary of Health and Human Services — namely 86% thereof.[2]

Dr. Stern then argued that the Government was not "substantially justified" in its imposition of penalties against him. The opinion of the Second Circuit, in its review of the administrative proceeding below, had made it clear that not only did Dr. Stern understand the plea agreement to subject him only to a future civil action to recover losses, but that the Government itself understood the plea agreement that way, and, in fact, consciously and intentionally sought to subvert that agreement.

Dr. Stern asserted that under the circumstances, it simply could not be said that the imposition of penalties, or the litigating position of the Government in support

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[2] The ALJ also reduced the proposed 30-year exclusion from Medicare to 10 years.

thereof, had substantial justification. Mr. Hoyle, at oral argument (the transcript of which is attached), admitted to the legal principle that plea agreements are enforceable against the Government and are to be construed according to what the defendant reasonably understood.

Furthermore, Dr. Stern emphasized that the Government had ample opportunity to spare him four arduous years of administrative proceedings, followed by an expensive appeal to the Second Circuit, in order to vacate the penalties. All of the legal issues raised on the Petition for Review to the Second Circuit were raised as far back as the first part of 1990, by Dr. Stern's counsel, in memoranda and briefs to the Administrative Law Judge. Dr. Stern, in mid-1990, even sought to enjoin the administrative proceedings through an injunction action in federal district court. Dr. Stern submitted that it ill-behooved the

Government not to take responsibility for the enormous amount of expense which it had caused.

The Government's Argument

In its opposition to Dr. Stern's application for attorney's fees under the EAJA, the Government argued that Dr. Stern was not entitled to an EAJA award because 1) the Government was substantially justified in its interpretation of the plea agreement as not precluding the imposition of penalties; and 2) regardless of whether it was substantially justified in respect to the single issue of the plea agreement, the position of the Government was substantially justified "as a whole," in that the Government was justified in bringing a CMPL proceeding, as evidenced by the fact that the ALJ confirmed, and the Second Circuit did not disturb, the assessments sought by the Government, and exclusion of Dr. Stern from the Medicare pro-

gram (albeit 1/3 of the length sought by the Government); and as further evidenced by the ALJ's confirmation (undisturbed by the Second Circuit) of the basic underlying position of the Inspector General that Dr. Stern submitted claims which he knew or should have known were improper.

The Government also asserted that even if it could be assumed that the Government's position was not substantially justified with respect to the issue of the plea agreement's preclusive effect on the imposition of penalties, Dr. Stern was a prevailing party with respect to only one of the three sanctions levied against him (penalties, assessments and Medicare exclusion); and therefore, "at the most," he would be entitled to one-third of the fees and expenses incurred by him.

The Government also argued, in addition to its other arguments concerning substantial justification and "prevailing party" status, that Dr. Stern was not entitled to EAJA fees for the administrative proceeding, in which he explicitly represented himself *pro se*;[3] and that Dr. Stern was not entitled to those fees which he incurred in his unsuccessful collateral attempt to enjoin the administrative proceeding.[4]

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[3] The Petitioner pointed out, in his reply brief submitted to the Second Circuit, that it was only with respect to actual invoiced fees of petitioner's counsel that an award was sought. Petitioner's counsel did enter a formal appearance in the administrative proceeding for the purpose of acting on behalf of the Petitioner in the extensive discovery and motion process. Petitioner's counsel also handled the entire Petition for Review to the Second Circuit.

[4] The itemization of fees by Petitioner's counsel indicated that $26,612 of the $141,666 of his fees pertained to the collateral proceeding. The justification for including the fees pertaining to such collateral proceeding is found

(continued...)

The Second Circuit Decision

The Second Circuit denied Mr. Stern's application under the EAJA on March 20, 1995. The Second Circuit did not issue an opinion with its denial.

REASONS FOR GRANTING THE WRIT

I

THIS CASE PRESENTS AN OPPORTUNITY FOR THIS COURT TO ARTICULATE NECESSARY STANDARDS FOR DETERMINING "PREVAILING PARTY" STATUS AND WHETHER THE GOVERNMENT'S POSITION LACKS SUBSTANTIAL JUSTIFICATION, FOR PURPOSES OF GRANTING OR DENYING AN AWARD OF ATTORNEY'S FEES UNDER THE EQUAL ACCESS TO JUSTICE ACT, IN CIRCUMSTANCES WHERE A COURT HAS SUBSTANTIALLY REDUCED DAMAGES AWARDED BY AN

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[4](...continued)
in *INS v. Jean*, 496 U.S. 154 (1990), which speaks to treating a case as an inclusive whole in determining the efforts for which fees should be awarded.

ADMINISTRATIVE AGENCY AGAINST THE PETITIONER OR HAS OTHERWISE SUBSTANTIALLY MODIFIED A DETERMINATION OF THAT AGENCY ADVERSE TO THE PETITIONER.

Since its enactment in 1980, this Court has devoted six cases to an in depth discussion of the EAJA. The majority of these cases concern issues that are either procedural or otherwise only indirectly related to the heart of the EAJA — the interpretation of the phrases "prevailing party" and "substantially justified." *See Shalala v. Schaefer*, 113 S.Ct. 2625 (1993) (timeliness of applications under the EAJA) and *Ardestani v. I.N.S.*, 112 S.Ct. 515 (1991) (scope of EAJA does not extend to deportation proceedings). This case provides the Court with a timely opportunity to apply the issues at the heart of the EAJA to a compelling set of circumstances.

Substantial Justification

Pierce v. Underwood, 108 S.Ct. 2541 (1988), the first, and seminal, Supreme Court case addressing the EAJA, provides an interpretation of the phrase "substantially justified." This Court stated that for the Government's position to be substantially justified, it must be "'justified in substance or in the main' — that is, justified to a degree that could satisfy a reasonable person." *Id.* at 2550.

Seven years have passed since this Court's decision in *Pierce v. Underwood*. The case at hand provides appropriate circumstances allowing this Court to provide further guidance to federal courts in applying the standard for "substantial justification."

Pierce v. Underwood, *supra*, addressed a situation in which the Government had decided not to implement an operating subsidy program authorized by federal statute

which was intended to provide payments to owners of Government-subsidized housing. In finding that the district court did not abuse its discretion in finding that the Government's "position" was not substantially justified, the "position" of the Government being addressed was its overall position in disallowing operating subsidies to owners of government-subsidized apartment buildings.

Pierce v. Underwood did not address the more multi-faceted and not unusual situation presented by the case at bar, in the context of a determination rendered in an administrative proceeding, where it may be conceded, *arguendo*, that the initiation of the CMPL proceeding itself by the Government was substantially justified, but where the Government's position as to a major facet thereof, namely the imposition of penalties, was not justified due to

the prior plea agreement between the Government and the petitioner.

The Government has argued that EAJA fees should not be awarded because the Government was justified in concluding that Dr. Stern had submitted claims he knew, or should have known, were improper; and therefore because the Government was justified in instituting a CMPL proceeding, even though it may not have been substantially justified in one of its major positions, namely the imposition of penalties. Citing *Commissioner, INS v. Jean*, 496 U.S. 154, 161-162 (1990), the Government has argued that while parties' postures on individual matters may be more or less justified, the EAJA favors treating a case as an inclusive whole; and that such a standard would preclude recovery of attorney's fees in this case.

In short, the issue which it is submitted is appropriate for this Court to consider, on certiorari, is whether substantial justification should be determined in the context of a principal issue upon which the Petitioner prevailed (namely that of the preclusive effect of the plea agreement on the imposition of penalties) or alternatively, as the Government would argue, whether substantial jsutification should be determined in the context of Dr, Stern's underlying conduct, and, therefore, the justification of the Government in having instituted a CMPL proceeding and having recovered some of the relief which it sought.

The Second Circuit, it appears, has adopted the Government's approach, which does not give material recognition to the fact that the Government was not substantially justified in ignoring the plea agreement, and, therefore, in imposing penalties. In fact, had the Second

Circuit regarded the Government's position as to the plea agreement material to the determination of "substantial justification," it is hard to believe it would have denied Dr. Stern's application for fees, since in *Green v. Bowen*, 877 F.2d 204 (2nd Cir. 1989), the Second Circuit stated that "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing [the] suit,' the plaintiff is entitled to an award of attorney's fees."[5]

It is submitted that the question of which "position" of the Government must be substantially unjustified as a

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[5] The Second Circuit has also stated, in *Environmental Defense Fund, Inc. v. Watt*, 722 F.2d 1081 (1983), that the test for determining whether the government's position is substantially justified is "essentially one of reasonableness," and that a "strong showing" must be made by the Government to sustain its burden of showing such reasonableness.

pre-requisite to recovery under the EAJA, deserves clarification from this Court.

Prevailing Party

In *Texas State Teachers Association v. Garland Independent School Dist.*, 109 S.Ct. 1486 (1989), this Court adopted the following standard for "prevailing party" status under the Civil Rights Attorney's Fee Awards Act of 1976, 42 U.S.C. § 1988: "A prevailing party must be one who has succeeded on any significant claim affording it some of the relief sought, either pendente lite or at the conclusion of the litigation." *Id.*, at 1494.

This standard has specifically been adopted by the Second Circuit, in the past, for purposes of determining "prevailing party" status under the EAJA. *Green v. Bowen*, 877 F.2d 204 (2nd Cir. 1989).

However, the Supreme Court has not enunciated this standard as applicable to the EAJA; and in the case at bar, the Second Circuit has apparently abandoned its holding to that effect in *Green v. Bowen*, *supra*, since it has awarded the petitioner no attorney's fees whatsoever. Admittedly, the purposes of the EAJA and the Civil Rights Attorney's Fee Awards Act of 1976 may not be identical; and certain touchstones for determining "prevailing party" status under the Civil Rights Attorney's Fee Awards Act of 1976, which were enunciated by the Supreme Court in *Texas State Teachers Association v. Garland Independent School Dist.*, *supra*, such as that the plaintiff, at a minimum, "must be able to point to a resolution of the dispute which changes the legal relationship between itself and the defendant," are not particularly applicable to many non-civil-rights actions.

It is submitted, however, that the standard enunciated by the Supreme Court in *Texas State Teachers Association v. Garland Independent School Dist.*, *supra*, is the appropriate standard to apply in EAJA actions. But, in the absence of an explicit extension by the Supreme Court of such standard to EAJA actions, circuit courts such as the Second Circuit are apparently left without sufficient guidance; and may, as in the case at bar, consider that the petitioner is not a prevailing party at all, despite his success with respect to a substantial issue, because the Government prevailed in confirming that it was legitimate to have brought a CMPL proceeding, and more particularly because the Government prevailed in confirming its underlying position that Dr. Stern had submitted claims which he knew or should have known were not justified.

With more specific reference to the case at bar, this Court has not yet articulated a standard for "prevailing party" status which dictates, or at least provides firm guidance for determining, answers to the following questions: 1) Is a party necessarily a "prevailing party" if it succeeds, as did Dr Stern in this case, in vacating monetary sanctions constituting approximately 86% of the total monetary sums in issue; 2) If not, what is the necessary measure of success, where there are, at issue, "assessments," "penalties," and an exclusion from Medicare; 3) Is "prevailing party" status to be determined not by reference to, or solely by reference to, the *relief* or *benefits* which have been won by the petitioner, but rather by reference to the underlying issues of law and fact; and 4) If "prevailing party" status is to be determined by reference to the underlying issues of law and fact, is the relevant question

whether the petitioner prevailed on an important issue in the case, namely the issue of the interpretation of the plea agreement (in which case, the petitioner would be a prevailing party), or is the relevant question whether the Government prevailed in sustaining the legitimacy of a CMPL proceeding, in that Dr. Stern submitted claims he knew or should have known were improper (in which case the petitioner might not be considered a prevailing party).

It is submitted, as well, that guidance from this Court is necessary as to appropriate measures for determining the amount of attorney's fees, in the context of a multi-facted case such as the one at bar, where, as the Government has admitted, the petitioner could be considered a "prevailing party" with respect to one issue, namely that of the imposition of penalties. In this case, the Government argued that at most, the petitioner should be awarded one-

third of the attorney's fees claimed, since he prevailed on only one of three issues (penalties, assessments, and exclusion from Medicare).

In so arguing, the Government did not account for the following:

1. The penalties amounted to approximately 86% of the monetary exactions sought by the Government.

2. The Government had sought a thirty-year exclusion from Medicare, which was reduced by the ALJ to ten years.

As importantly, the Government's attempt to argue for a rigid formula, that would result in an allowance of "at most only one third of the fees and costs" incurred by the petitioner, totally failed to take cognizance of the total picture. Had the Government originally proposed no more than a ten-year exclusion from Medicare (which

would have been only five more years than already imposed, by mandate of statute, in the prior administrative proceeding), and had it originally proposed an assessment of $70,648, rather than a totality of assessments and penalties totalling $485,898, four years of arduous hearings, appeals, and review by the Second Circuit, might have been avoided. Furthermore, enormous time and effort was expended by the Petitioner in briefing and presenting evidence with respect to eight different theories upon which the penalties should not have been imposed. The fact that the Second Circuit only needed to find on one of these theories (namely that of the plea agreement), in order to vacate the penalties, does not mean that the petitioner's time and effort in espousing all of its theories was inappropriate; and in fact, the Second Circuit indicated that the Petitioner's arguments with respect to the collat-

eral estoppel effect of the prior administrative hearing were substantial, but need not be reached.

Furthermore, the fact that the assessments of $70,648 were not eliminated, and that ten years of Medicare exclusion were upheld, does not mean that exactly the same amount of time and effort would not have been necessarily expended by the petitioner in addressing the penalties alone, since all of the legal issues raised by the Petitioner, and all of the evidence presented by the Petitioner, pertained to the penalties.

In the case at bar, the Government felt that "prevailing party" status would deserve at most an award of one-third of the fees incurred, based on a wooden formula. The Second Circuit apparently concluded that Dr. Stern's "prevailing party" status, if it existed, deserved no fees.

Accordingly, it is submitted that clarification is warranted with respect to both the issue of whether *Texas State Teachers Association v. Garland Independent School Dist.*, *supra*, provides the appropriate standard to be applied under the EAJA for determining "prevailing party" status; and if so, what are the appropriate measuring standards and other criteria to be applied in determining the proportion of fees, incurred by the petitioner, which should be awarded in a multi-faceted case, such as the case at bar.

II

THIS COURT SHOULD EXERCISE ITS POWER OF SUPERVISION OVER THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT BECAUSE OF THAT COURT'S DENIAL OF DR. STERN'S EAJA APPLICATION WITHOUT OPINION, UNDER FACTS INDICATING A HIGH IMPROBABILITY THAT THAT COURT COULD HAVE

DENIED AN AWARD OF SUCH FEES WITHOUT SUBSTANTIALLY MODIFYING ITS OWN PRECEDENT

Supreme Court Rule 10.1.(2) provides that this Court, in its discretion, may grant a writ of certiorari when a United States court of appeals "has so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision." Dr. Stern asserts that the circumstances of the case at hand warrant an exercise of this Court's power of supervision.

In *Green v. Bowen*, 877 F.2d 204 (2nd Cir. 1989), the Second Circuit, in awarding EAJA fees, adopted the Supreme Court's pronouncement under the Civil Rights Attorney's Fees Awards Act:

> "If the plaintiff has succeeded on 'any significant issue in litigation which achieve[d] some of the benefit the parties sought in bringing [the] suit,'

> the plaintiff is entitled to an award of attorney's fees."

The position of the Second Cirtcuit in *Green v. Bowen*, *supra*, would appear so strongly to warrant serious consideration as to whether a decision should likewise be made in Dr. Stern's favor, in the case at bar, that the choice of the Second Circuit not even to write an opinion, in the circumstances of this case, is a violation of its duties.

The Supreme Court, in *Pearce v. Underwood*, *supra*, has determined that in reviewing the determination of the fact finder as to whether the Government's position was substantially justified, an abuse-of-discretion standard should be applied. Although, usually, the fact finder is a district court, whose determination is being reviewed by a Court of Appeals, the situation is different in the case at bar. The fact finder here is the Court of Appeals, and the

only possible review of its "discretion" is in the Supreme Court. The Second Circuit has made it most difficult for the Supreme Court to exercise its potential review function, in failing to write an opinion explaining the exercise of its "discretion."

It is not as if Dr. Stern's application, and the counter arguments of the Government, were casually presented to the Second Circuit. Dr. Stern's application to the Second Circuit, under the EAJA, inclusive of case citations and arguments (but exclusive of appendices) was twenty-three pages in length; the Government's responding brief was thirty pages in length; and Dr. Stern's reply brief was eighteen pages in length. The questions were presented carefully and fully.

It would appear that the Second Circuit did not write an opinion because it did not want to find further for the

petitioner (it already having deprived the government of several hundreds of thousands of dollars).

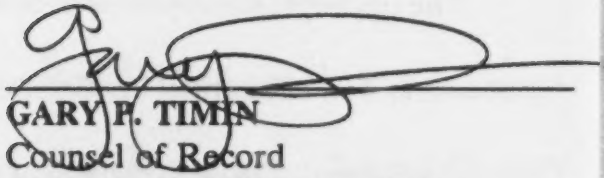
This Petition for Writ of Certiorari is the sole means available to petitioner for review of the Second Circuit's fact finding, legal, and "discretionary" function.

The Second Circuit framed its original decision, on the merits of Dr. Stern's challenge to the sanctions imposed against him, as an affirmance of the administrative panel. The Court stated: "As modified by the elimination of the $345,000 in penalties, the decision requiring payment of $70,648 in assessments is affirmed." It is submitted that review by this Court should not be hindered by the wordage used by the Second Circuit in effectively reversing the administrative agency in major part.

CONCLUSION

The appropriate application of the EAJA by the federal courts is of substantial importance to the fulfillment of the objectives of that Act, namely to provide access to the judicial system for those who have been subjected to unreasonable governmental action. Although the Supreme Court has enunciated certain basic principles applicable to the interpretation of the EAJA, federal courts have been left to determine its application in situations such as the case at bar. The lack of more specific guidance has resulted in the Government making arguments such as in the case at bar, and has resulted in the success of such arguments. Accordingly, it is submitted that it is of substantial importance that the Supreme Court further define the scope and proper interpretation of the EAJA.

Respectfully submitted,



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Attorneys for Petitioner

APPENDIX A

Final Decree of the
United States Court of Appeals
for the Second Circuit

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PAGE 1

United States Court of Appeals
FOR THE SECOND CIRCUIT

Such motion must be accompanied by a supporting affidavit (Local Rule 27(a)).

Timothy L. Stern,

Petitioner,

v.

DONNA E. SHALALA, etc.,
Respondent.

Use short title

93-4100

Docket number

NOTICE OF MOTION

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Fees and Expenses Under Equal Access to Justice Act

UNITED STATES COURT OF APPEALS FILED JAN 30 1995 GEORGE LANGE M. CLERK SECOND CIRCUIT

MOTION BY: (Name, address and tel. no. of law firm and of attorney in charge of case)

Arthur L. Stern, III
106 East College Avenue, Suite 1200
Tallahassee, FL 32301 (904) 224-9634

OPPOSING COUNSEL: (Name, address and tel. no. of law firm and of attorney in charge of case)

John C. Hoyle
Department of Justice
Room 3617 MAIN, 10th & Pennsylvania Avenue, N.W.
Washington, D.C.

Has consent of opposing counsel:
A. been sought? ☐ Yes ☒ No
B. been obtained? ☐ Yes ☒ No
Has service been effected? ☒ Yes ☐ No
Is oral argument desired? If Ct. desires ☐ Yes ☐ No
(Substantive motions only)
Requested return date:
(See Second Circuit Rule 27(b))
Has argument date of appeal been set:
A. by scheduling order? ☐ Yes ☒ No
B. by firm date of argument notice? ☐ Yes ☒ No
C. If Yes, enter date:

EMERGENCY MOTIONS, MOTIONS FOR STAYS & INJUNCTIONS PENDING APPEAL
Has request for relief been made below? ☐ Yes ☐ No
(See F.R.A.P. Rule 8)
Would expedited appeal eliminate need for this motion? ☐ Yes ☐ No
If No, explain why not:
Will the parties agree to maintain the status quo until the motion is heard? ☐ Yes ☐ No

Judge or agency whose order is being appealed:
N/A

Brief statement of the relief requested: Attorneys fees of $141,666 and expenses of $6,930 sought pursuant to Equal Access to Justice Act, on grounds U.S. not substantially jusitifed in imposing penalties under Civil Monetary Penalties Law. Fees and expenses sought in connection with administrative hearing and Petition for Review in this Court (decided January 11, 1994, reh. denied September 22, 1994).

Complete Part 2 of this Form

By: (Signature of attorney)

Arthur L. Stern, III

Signed name must be printed beneath

Appearing for: (Name of party)

Timothy L. Stern

Appellee or Petitioner: ☒ Plaintiff ☐ Defendant
Appellee or Respondent: ☐ Plaintiff ☐ Defendant

Date

January 19, 1995

ORDER

Kindly leave this space blank

IT IS HEREBY ORDERED that the motion be and it hereby is [redacted] denied.

UNITED STATES COURT OF APPEALS FILED MAR 30 1995 GEORGE LANGE M. CLERK SECOND CIRCUIT

FOR THE COURT

Date

Clerk

Richard V. Caracappa (Deputy Clerk)

Deputy Clerk

BEST AVAILABLE COPY

APPENDIX B

Opinion of the
United States Court of Appeals
for the Second Circuit
in Stern v. Shalala, 14 F.3d 148 (1994)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 768—August Term 1993

Argued: December 10, 1993 Decided: January 11, 1994

Docket No. 93-4100

TIMOTHY L. STERN,

Petitioner,

—v.—

DONNA E. SHALALA, SECRETARY OF THE UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES, AND BRYAN B. MITCHELL, PRINCIPAL DEPUTY INSPECTOR GENERAL,

Respondents.

Before:

NEWMAN, *Chief Judge*,
OAKES and CARDAMONE, *Circuit Judges*.

Petition for review of the March 16, 1993, decision of the Health and Human Services Departmental Appeals Board finding petitioner liable under the Civil Monetary

Penalties Law, 42 U.S.C. § 1320a-7a (1988 & Supp. III 1991).

Modified and affirmed as modified.

ARTHUR L. STERN, III, Tallahassee, Fla., *for petitioner.*

JOHN C. HOYLE, Appellate Staff, Civil Div., Dept. of Justice, Wash., D.C. (Frank W. Hunger, Asst. Atty. Gen., Anthony J. Steinmeyer, Wash., D.C., on the brief), *for respondents.*

JON O. NEWMAN, *Chief Judge*:

This petition for review challenges, on various grounds, civil assessments and penalties imposed upon a doctor by the Department of Health and Human Services ("HHS") for submitting fraudulent Medicare claims. Dr. Timothy L. Stern petitions for review of the March 16, 1993, decision of the HHS Departmental Appeals Board finding him liable under the Civil Monetary Penalties Law ("CMPL"), 42 U.S.C. § 1320a-7a (1988 & Supp. III 1991). The Board imposed "assessments" of $70,648 and "penalties" of $345,000. We conclude that the penalties were imposed in violation of a plea agreement that concluded criminal charges against Dr. Stern. We therefore modify the agency's decision and affirm it, as modified.

Background

Dr. Stern practiced, as a sole practitioner, at the Rochester Pain Clinic from 1980 to 1986. He collected payment from his patients at the time services were rendered and then submitted claims on behalf of the patients to Blue Shield of Western New York ("BSWNY"), the then-designated Medicare carrier for the region. BSWNY and the Inspector General ("IG") of HHS decided to seek a criminal prosecution after their investigations indicated that Dr. Stern was performing acupuncture but claiming his services as nerve blocks and "office visits."

The criminal proceedings against Stern. In January 1986, a federal grand jury returned a 19-count indictment against Stern, charging him with mail fraud, filing false claims, intimidation of grand jury witnesses, mailing threatening communications, and conspiracy, and, in a separate indictment, with 23 counts of unlawful distribution of codeine to himself. On July 15, 1987, pursuant to a plea agreement, the details of which are set forth below, Dr. Stern pleaded guilty to one count of mail fraud (encompassing seven false Medicare claims submitted by Dr. Stern), 18 U.S.C. § 1341 (1988), and one count of unlawful distribution of codeine, 21 U.S.C. § 841(a)(1) (1988).

On September 24, 1987, Dr. Stern received concurrent five-year suspended sentences and five years of probation. He was also ordered to pay restitution to patients in an amount not exceeding $70,000, to issue a personal apology to a grand jury witness whom he had threatened, and to continue in a drug rehabilitation program and psychiatric care. As a condition of his plea agreement, Dr. Stern also surrendered his license to practice medicine in New York.

Under 42 U.S.C. §§ 1320a-7(a)(1) and 1320a-7(c)(3)(B), the Secretary of HHS is required to exclude a person convicted of a criminal offense related to service under Medicare from participation in Medicare or any state health care program for a minimum of five years. After HHS notified Stern in April of 1988 that he was being excluded for twenty years, Stern petitioned for review of his exclusion pursuant to 42 U.S.C. § 1320a-7(f).

The HHS Office of Hearings and Appeals in Syracuse (Joseph G. Medicis, ALJ) reduced Stern's exclusion to the mandatory minimum five-year period. ALJ Medicis found that there was a "legitimate difference of opinion" as to whether Stern's services were reimbursable. The HHS Appeals Council denied the IG's request for review, concluding "that there is no basis for changing the Administrative Law Judge's decision."

Proceedings under the CMPL. Shortly after ALJ Medicis issued his decision, the IG issued a Notice of Determination, informing Stern that the IG was initiating proceedings under the CMPL seeking an assessment of $70,648, civil monetary penalties of $425,250, and a 30-year exclusion from participation in Medicare and state health care programs. In the proceedings that followed, the HHS Departmental Appeals Board, Civil Remedies Division (Charles E. Stratton, ALJ) and the Appellate Division found that the "Respondent submitted claims to Medicare for services which he knew, should have known or had reason to know were not provided as claimed." Such a finding of *scienter*, which appears to be at variance with the finding of ALJ Medicis, is a prerequisite for liability under the CMPL, see 42 U.S.C. § 1320a-7a(a)(1)(A). ALJ Stratton originally imposed assessments of $45,000 and penalties of $140,000. After the HHS

Appellate Division rejected as irrelevant or unsubstantiated the ALJ's consideration of all allegedly mitigating factors, ALJ Stratton on remand imposed assessments of $70,648, the full amount sought by the IG, and penalties of $345,000; the Appellate Division affirmed. Dr. Stern seeks review of this final determination by HHS.

Discussion

Petitioner presents a substantial argument that the imposition of penalties based on a finding of *scienter* is barred by the collateral estoppel effect of the prior administrative determination that there was a "legitimate difference of opinion" whether Stern's services were reimbursable. However, we need not resolve that contention because the penalties are precluded in any event by the plea agreement that concluded the criminal prosecution.

The plea agreement provided that Stern would plead guilty to one count of mail fraud and one count of distributing a controlled substance, and would surrender his license to practice medicine. The agreement also specified that restitution might be ordered in an amount no less than $5,000 and no more than $110,000, the amounts to depend upon verifiable claims of patients. In a sentence critical to this petition for review, the agreement further provided: "Claims of the Medicare program will be determined in a separate civil proceeding and will not be part of the restitution ordered by the Court." This provision was given further meaning during the plea allocution. The Assistant United States Attorney informed the defendant and the Court, "An additional one hundred ninety thousand dollars which the Medicare program alleges they lost in this will be handled in a separate civil proceeding and

will not be part of the disposition of this case." The Court also discussed with the defendant what claims remained to be pursued: "And that there are disputed claims in the amount of one hundred ninety thousand dollars which involve a separate civil case and that is not involved in this plea agreement. Do you understand that?" Stern replied, "I do understand." There was no mention of any remaining dispute concerning civil penalties.

Two weeks later, the prosecutor wrote to the IG, recommending that the Government pursue a claim for civil penalties instead of the $190,000 of civil assessments for actual losses that had been discussed at the plea allocution. This letter fully confirms Stern's understanding that only the claim for actual losses remained open: "Timothy L. Stern understands that Medicare will initiate civil action against him to recover a loss of approximately $190,000." The prosecutor urged the proposed switch to penalties as "more appropriate" and "much easier" for HHS. Ultimately, the amount of the losses, as determined in the administrative proceedings, was $70,648, the amount of assessments sought by the IG.

Courts enforce what "the defendant reasonably understood" the plea agreement to mean when the guilty plea was entered, *United States v. Corsentino*, 685 F.2d 48, 51 (2d Cir. 1982); *accord, e.g., United States v. Nelson*, 837 F.2d 1519, 1521 (11th Cir.), *cert. denied*, 488 U.S. 829 (1988); *In re Arnett*, 804 F.2d 1200, 1203 (11th Cir. 1986); *Johnson v. Beto*, 466 F.2d 478, 480 (5th Cir. 1972); *United States v. Crusco*, 536 F.2d 21, 27 (3d Cir. 1976). A "rigidly literal approach in the construction of language" of a plea agreement is not appropriate, *see United States v. Bowler*, 585 F.2d 851, 854 (7th Cir. 1978) (citing *United States v. Brown*, 500 F.2d 375 (4th Cir. 1974)), and

oral agreements can amplify ambiguous terms, *see Arnett*, 804 F.2d at 1202.

In the pending case, the plea agreement left "[c]laims of the Medicare program" open for determination in a later "civil proceeding," and the defendant understood those claims to be actual losses alleged to total no more than $190,000. That understanding was articulated by the District Judge and shared by the prosecutor until he decided that it would be "much easier" to pursue a claim for penalties. Under these circumstances, the collection of penalties in the amount of $345,000 was barred by the plea agreement, and these penalties must be stricken from the agency's decision. As modified by the elimination of the $345,000 in penalties, the decision requiring payment of $70,648 in assessments is affirmed.

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APPENDIX C

Statutory Provisions

STATUTORY PROVISIONS

28 USCA Sec. 2412

Sec. 2412. Costs and fees

(a)(1) Except as otherwise specifically provided by statute, a judgment for costs, as enumerated in section 1920 of this title, but not including the fees and expenses of attorneys, may be awarded to the prevailing party in any civil action brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. A judgment for costs when taxed against the United States shall, in an amount established by statute, court rule, or order, be limited to reimbursing in whole or in part the prevailing party for the costs incurred by such party in the litigation.

(2) A judgment for costs, when awarded in favor of the United States in an action brought by the United States, may include an amount equal to the filing fee prescribed under section 1914(a) of this title. The preceding sentence shall not be construed as requiring the United States to pay any filing fee.

(b) Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys, in addition to the costs which may be awarded pursuant to subsection (a), to the prevailing party in any civil action

brought by or against the United States or any agency or any official of the United States acting in his or her official capacity in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

(c)(1) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for costs pursuant to subsection (a) shall be paid as provided in sections 2414 and 2517 of this title and shall be in addition to any relief provided in the judgment.

(2) Any judgment against the United States or any agency and any official of the United States acting in his or her official capacity for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

(d)(1)(A) Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and other expenses, in addition to any costs awarded pursuant to subsection (a), incurred by that party in any civil action (other than cases sounding in tort), including proceedings for judicial review of agency

action, brought by or against the United States in any court having jurisdiction of that action, unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

(B) A party seeking an award of fees and other expenses shall, within thirty days of final judgment in the action, submit to the court an application for fees and other expenses which shows that the party is a prevailing party and is eligible to receive an award under this subsection, and the amount sought, including an itemized statement from any attorney or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the United States was not substantially justified. Whether or not the position of the United States was substantially justified shall be determined on the basis of the record (including the record with respect to the action or failure to act by the agency upon which the civil action is based) which is made in the civil action for which fees and other expenses are sought.

(C) The court, in its discretion, may reduce the amount to be awarded pursuant to this subsection, or deny an award, to the extent that the prevailing party during the course of the proceedings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy.

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $75 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act

(12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to the Contract Disputes Act of 1978;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Veterans Appeals;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement; and

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government.

(3) In awarding fees and other expenses under this subsection to a prevailing party in any action for judicial review of an adversary adjudication, as defined in subsection (b)(1)(C) of section 504 of title 5, United States Code, or an adversary adjudication subject to the Contract Disputes Act of 1978, the court shall include in that award fees and other expenses to the same extent authorized in subsection (a) of such section, unless the court finds that during such adversary adjudication the position of the United States was substantially justified, or that special circumstances make an award unjust.

(4) Fees and other expenses awarded under this subsection to a party shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(5) The Attorney General shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this subsection. The report shall describe the number, nature, and amount of the awards, the claims involved in the con-

troversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards.

(e) The provisions of this section shall not apply to any costs, fees, and other expenses in connection with any proceeding to which section 7430 of the Internal Revenue Code of 1986 applies (determined without regard to subsections (b) and (f) of such section). Nothing in the preceding sentence shall prevent the awarding under subsection (a) of section 2412 of title 28, United States Code, of costs enumerated in section 1920 of such title (as in effect on October 1, 1981).

(f) If the United States appeals an award of costs or fees and other expenses made against the United States under this section and the award is affirmed in whole or in part, interest shall be paid on the amount of the award as affirmed. Such interest shall be computed at the rate determined under section 1961(a) of this title, and shall run from the date of the award through the day before the date of the mandate of affirmance.

5 USCA Sec. 504

Sec. 504. Costs and fees of parties

(a)(1) An agency that conducts an adversary adjudication shall award, to a prevailing party other than the United States, fees and other expenses incurred by that

party in connection with that proceeding, unless the adjudicative officer of the agency finds that the position of the agency was substantially justified or that special circumstances make an award unjust. Whether or not the position of the agency was substantially justified shall be determined on the basis of the administrative record, as a whole, which is made in the adversary adjudication for which fees and other expenses are sought.

(2) A party seeking an award of fees and other expenses shall, within thirty days of a final disposition in the adversary adjudication, submit to the agency an application which shows that the party is a prevailing party and is eligible to receive an award under this section, and the amount sought, including an itemized statement from any attorney, agent, or expert witness representing or appearing in behalf of the party stating the actual time expended and the rate at which fees and other expenses were computed. The party shall also allege that the position of the agency was not substantially justified. When the United States appeals the underlying merits of an adversary adjudication, no decision on an application for fees and other expenses in connection with that adversary adjudication shall be made under this section until a final and unreviewable decision is rendered by the court on the appeal or until the underlying merits of the case have been finally determined pursuant to the appeal.

(3) The adjudicative officer of the agency may reduce the amount to be awarded, or deny an award, to the extent that the party during the course of the proceed-

ings engaged in conduct which unduly and unreasonably protracted the final resolution of the matter in controversy. The decision of the adjudicative officer of the agency under this section shall be made a part of the record containing the final decision of the agency and shall include written findings and conclusions and the reason or basis therefor. The decision of the agency on the application for fees and other expenses shall be the final administrative decision under this section.

(b)(1) For the purposes of this section--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the agency to be necessary for the preparation of the party's case, and reasonable attorney or agent fees (The amount of fees awarded under this section shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the agency involved, and (ii) attorney or agent fees shall not be awarded in excess of $75 per hour unless the agency determines by regulation that an increase in the cost of living or a special actor, such as the limited availability of qualified attorneys or agents for the proceedings involved, justifies a higher fee.);

(B) "party" means a party, as defined in section 551(3) of this title, who is (i) an individual whose net

worth did not exceed $2,000,000 at the time the adversary adjudication was initiated, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the adversary adjudication was initiated, and which had not more than 500 employees at the time the adversary adjudication was initiated; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1954 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association, as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association;

(C) "adversary adjudication" means (i) an adjudication under section 554 of this title in which the position of the United States is represented by counsel or otherwise, but excludes an adjudication for the purpose of establishing or fixing a rate or for the purpose of granting or renewing a license, (ii) any appeal of a decision made pursuant to section 6 of the Contract Disputes Act of 1978 (41 U.S.C. 605) before an agency board of contract appeals as provided in section 8 of that Act (41 U.S.C. 607), (iii) any hearing conducted under chapter 38 of title 31, and (iv) the Religious Freedom Restoration Act of 1993;

(D) "adjudicative officer" means the deciding official, without regard to whether the official is designated as an

administrative law judge, a hearing officer or examiner, or otherwise, who presided at the adversary adjudication; and

(E) "position of the agency" means, in addition to the position taken by the agency in the adversary adjudication, the action or failure to act by the agency upon which the adversary adjudication is based; except that fees and other expenses may not be awarded to a party for any portion of the adversary adjudication in which the party has unreasonably protracted the proceedings.

(2) Except as otherwise provided in paragraph (1), the definitions provided in section 551 of this title apply to this section.

(c)(1) After consultation with the Chairman of the Administrative Conference of the United States, each agency shall by rule establish uniform procedures for the submission and consideration of applications for an award of fees and other expenses. If a court reviews the underlying decision of the adversary adjudication, an award for fees and other expenses may be made only pursuant to section 2412(d)(3) of title 28, United States Code.

(2) If a party other than the United States is dissatisfied with a determination of fees and other expenses made under subsection (a), that party may, within 30 days after the determination is made, appeal the determination to the court of the United States having jurisdiction to review the merits of the underlying decision of the agency adversary adjudication. The court's determination on any

appeal heard under this paragraph shall be based solely on the factual record made before the agency. The court may modify the determination of fees and other expenses only if the court finds that the failure to make an award of fees and other expenses, or the calculation of the amount of the award, was unsupported by substantial evidence.

(d) Fees and other expenses awarded under this subsection shall be paid by any agency over which the party prevails from any funds made available to the agency by appropriation or otherwise.

(e) The Chairman of the Administrative Conference of the United States, after consultation with the Chief Counsel for Advocacy of the Small Business Administration, shall report annually to the Congress on the amount of fees and other expenses awarded during the preceding fiscal year pursuant to this section. The report shall describe the number, nature, and amount of the awards, the claims involved in the controversy, and any other relevant information which may aid the Congress in evaluating the scope and impact of such awards. Each agency shall provide the Chairman with such information as is necessary for the Chairman to comply with the requirements of this subsection.

(f) No award may be made under this section for costs, fees, or other expenses which may be awarded under section 7430 of the Internal Revenue Code of 1986.

42 USC Sec. 1320a-7a

Sec. 1320a-7a. Civil monetary penalties

(a) Improperly filed claims

Any person (including an organization, agency, or other entity, but excluding a beneficiary, as defined in subsection (i)(5) of this section) that--

(1) presents or causes to be presented to an officer, employee, or agent of the United States, or of any department or agency thereof, or of any State agency (as defined in subsection (i)(1) of this section), a claim (as defined in subsection (i)(2) of this section) that the Secretary determines--

(A) is for a medical or other item or service that the person knows or should know was not provided as claimed,

(B) is for a medical or other item or service and the person knows or should know the claim is false or fraudulent,

(C) is presented for a physician's service (or an item or service incident to a physician's service) by a person who knows or should know that the individual who furnished (or supervised the furnishing of) the service--

(i) was not licensed as a physician,

(ii) was licensed as a physician, but such license had been obtained through a misrepresentation of material fact (including cheating on an examination required for licensing), or

(iii) represented to the patient at the time the service was furnished that the physician was certified in a medical specialty by a medical specialty board when the individual was not so certified, or

(D) is for a medical or other item or service furnished during a period in which the person was excluded from the program under which the claim was made pursuant to a determination by the Secretary under this section or under section 1320a-7, 1320c-5, 1320c-9(b) (as in effect on September 2, 1982), 1395y(d) (as in effect on August 18, 1987), or 1395cc(b) of this title or as a result of the application of the provisions of section 1395u(j)(2) of this title; or

(2) presents or causes to be presented to any person a request for payment which is in violation of the terms of (A) an assignment under section 1395u(b)(3)(B)(ii) of this title, or (B) an agreement with a State agency (or other requirement of a State plan under subchapter XIX of this chapter) not to charge a person for an item or service in excess of the amount permitted to be charged, or (C) an agreement to be a participating physician or supplier under section 1395u(h)(1) of this title, or (D) an agreement pursuant to section 1395cc(a)(1)(G) of this title, [FN1] or

(3) gives to any person, with respect to coverage under subchapter XVIII of this chapter of inpatient hospital services subject to the provisions of section 1395ww of this title, information that he knows or should know is false or misleading, and that could reasonably be expected to influence the decision when to discharge such person or another individual from the hospital; shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $2,000 for each item or service (or, in cases under paragraph (3), $15,000 for each individual with respect to whom false or misleading information was given). In addition, such a person shall be subject to an assessment of not more than twice the amount claimed for each such item or service in lieu of damages sustained by the United States or a State agency because of such claim. In addition the Secretary may make a determination in the same proceeding to exclude the person from participation in the programs under subchapter XVIII of this chapter and to direct the appropriate State agency to exclude the person from participation in any State health care program.

(b) Payments to induce reduction or limitation of services

(1) If a hospital or a rural primary care hospital knowingly makes a payment, directly or indirectly, to a physician as an inducement to reduce or limit services provided with respect to individuals who--

(A) are entitled to benefits under part A or part B of subchapter XVIII of this chapter or to medical assis-

tance under a State plan approved under subchapter XIX of this chapter, and

(B) are under the direct care of the physician,

the hospital or a rural primary care hospital shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $2,000 for each such individual with respect to whom the payment is made.

(2) Any physician who knowingly accepts receipt of a payment described in paragraph (1) shall be subject, in addition to any other penalties that may be prescribed by law, to a civil money penalty of not more than $2,000 for each individual described in such paragraph with respect to whom the payment is made.

(c) Initiation of proceeding; authorization by Attorney General, notice, etc.; estoppel, failure to comply with order or procedure

(1) The Secretary may initiate a proceeding to determine whether to impose a civil money penalty, assessment, or exclusion under subsection (a) or (b) of this section only as authorized by the Attorney General pursuant to procedures agreed upon by them. The Secretary may not initiate an action under this section with respect to any claim, request for payment, or other occurrence described in this section later than six years after the date the claim was presented, the request for payment was made, or the occurrence took place. The Secretary may initiate an

action under this section by serving notice of the action in any manner authorized by Rule 4 of the Federal Rules of Civil Procedure.

(2) The Secretary shall not make a determination adverse to any person under subsection (a) or (b) of this section until the person has been given written notice and an opportunity for the determination to be made on the record after a hearing at which the person is entitled to be represented by counsel, to present witnesses, and to cross-examine witnesses against the person.

(3) In a proceeding under subsection (a) or (b) of this section which--

(A) is against a person who has been convicted (whether upon a verdict after trial or upon a plea of guilty or nolo contendere) of a Federal crime charging fraud or false statements, and

(B) involves the same transaction as in the criminal action, the person is estopped from denying the essential elements of the criminal offense.

(4) The official conducting a hearing under this section may sanction a person, including any party or attorney, for failing to comply with an order or procedure, failing to defend an action, or other misconduct as would interfere with the speedy, orderly, or fair conduct of the hearing. Such sanction shall reasonably relate to the

severity and nature of the failure or misconduct. Such sanction may include--

(A) in the case of refusal to provide or permit discovery, drawing negative factual inferences or treating such refusal as an admission by deeming the matter, or certain facts, to be established,

(B) prohibiting a party from introducing certain evidence or otherwise supporting a particular claim or defense,

(C) striking pleadings, in whole or in part,

(D) staying the proceedings,

(E) dismissal of the action,

(F) entering a default judgment,

(G) ordering the party or attorney to pay attorneys' fees and other costs caused by the failure or misconduct, and

(H) refusing to consider any motion or other action which is not filed in a timely manner.

(d) Amount or scope of penalty, assessment, or exclusion

In determining the amount or scope of any penalty, assessment, or exclusion imposed pursuant to subsection

(a) or (b) of this section, the Secretary shall take into account--

(1) the nature of claims and the circumstances under which they were presented,

(2) the degree of culpability, history of prior offenses, and financial condition of the person presenting the claims, and

(3) such other matters as justice may require.

(e) Review by courts of appeals

Any person adversely affected by a determination of the Secretary under this section may obtain a review of such determination in the United States Court of Appeals for the circuit in which the person resides, or in which the claim was presented, by filing in such court (within sixty days following the date the person is notified of the Secretary's determination) a written petition requesting that the determination be modified or set aside. A copy of the petition shall be forthwith transmitted by the clerk of the court to the Secretary, and thereupon the Secretary shall file in the Court the record in the proceeding as provided in section 2112 of Title 28. Upon such filing, the court shall have jurisdiction of the proceeding and of the question determined therein, and shall have the power to make and enter upon the pleadings, testimony, and proceedings set forth in such record a decree affirming, modifying, remanding for further consideration, or setting aside, in

whole or in part, the determination of the Secretary and enforcing the same to the extent that such order is affirmed or modified. No objection that has not been urged before the Secretary shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Secretary with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the hearing before the Secretary, the court may order such additional evidence to be taken before the Secretary and to be made a part of the record. The Secretary may modify his findings as to the facts, or make new findings, by reason of additional evidence so taken and filed, and he shall file with the court such modified or new findings, which findings with respect to questions of fact, if supported by substantial evidence on the record considered as a whole, shall be conclusive, and his recommendations, if any, for the modification or setting aside of his original order. Upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the same shall be subject to review by the Supreme Court of the United States, as provided in section 1254 of Title 28.

(f) Compromise of penalties and assessments; recovery; use of funds recovered

Civil money penalties and assessments imposed under this section may be compromised by the Secretary and may be recovered in a civil action in the name of the United States brought in United States district court for the district where the claim was presented, or where the claimant resides, as determined by the Secretary. Amounts recovered under this section shall be paid to the Secretary and disposed of as follows:

(1)(A) In the case of amounts recovered arising out of a claim under subchapter XIX of this chapter, there shall be paid to the State agency an amount bearing the same proportion to the total amount recovered as the State's share of the amount paid by the State agency for such claim bears to the total amount paid for such claim.

(B) In the case of amounts recovered arising out of a claim under an allotment to a State under subchapter V of this chapter, there shall be paid to the State agency an amount equal to three-sevenths of the amount recovered.

(2) Such portion of the amounts recovered as is determined to have been paid out of the trust funds under sections 1395i and 1395t of this title shall be repaid to such trust funds.

(3) The remainder of the amounts recovered shall be deposited as miscellaneous receipts of the Treasury of the United States.

The amount of such penalty or assessment, when finally determined, or the amount agreed upon in compromise, may be deducted from any sum then or later owing by the United States or a State agency to the person against whom the penalty or assessment has been assessed.

(g) Finality of determination respecting penalty, assessment, or exclusion

A determination by the Secretary to impose a penalty, assessment, or exclusion under subsection (a) or (b) of this section shall be final upon the expiration of the sixty-day period referred to in subsection (e) of this section. Matters that were raised or that could have been raised in a hearing before the Secretary or in an appeal pursuant to subsection (e) of this section may not be raised as a defense to a civil action by the United States to collect a penalty, assessment, or exclusion assessed under this section.

(h) Notification of appropriate entities of finality of determination

Whenever the Secretary's determination to impose a penalty, assessment, or exclusion under subsection (a) or (b) of this section becomes final, he shall notify the appropriate State or local medical or professional organization,

the appropriate State agency or agencies administering or supervising the administration of State health care programs (as defined in section 1320a-7(h) of this title), and the appropriate utilization and quality control peer review organization, and the appropriate State or local licensing agency or organization (including the agency specified in section 1395aa(a) and 1396a(a)(33) of this title) that such a penalty, assessment, or exclusion has become final and the reasons therefor.

(i) Definitions

For the purposes of this section:

(1) The term "State agency" means the agency established or designated to administer or supervise the administration of the State plan under subchapter XIX of this chapter or designated to administer the State's program under subchapter V of this chapter or subchapter XX of this chapter.

(2) The term "claim" means an application for payments for items and services under subchapter V, XVIII, XIX, or XX of this chapter.

(3) The term "item or service" includes (A) any particular item, device, medical supply, or service claimed to have been provided to a patient and listed in an itemized claim for payment, and (B) in the case of a claim based on costs, any entry in the cost report, books of account or other documents supporting such claim.

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(4) The term "agency of the United States" includes any contractor acting as a fiscal intermediary, carrier, or fiscal agent or any other claims processing agent for a health insurance or medical services program under subchapter XVIII or XIX of this chapter.

(5) The term "beneficiary" means an individual who is eligible to receive items or services for which payment may be made under subchapter V, XVIII, XIX, or XX of this chapter but does not include a provider, supplier, or practitioner.

(j) Subpoenas

(1) The provisions of subsections (d) and (e) of section 405 of this title shall apply with respect to this section to the same extent as they are applicable with respect to subchapter II of this chapter. The Secretary may delegate the authority granted by section 405(d) of this title (as made applicable to this section) to the Inspector General of the Department of Health and Human Services for purposes of any investigation under this section.

(2) The Secretary may delegate authority granted under this section and under section 1320a-7 of this title to the Inspector General of the Department of Health and Human Services.

(k) Injunctions

Whenever the Secretary has reason to believe that any person has engaged, is engaging, or is about to engage in any activity which makes the person subject to a civil monetary penalty under this section, the Secretary may bring an action in an appropriate district court of the United States (or, if applicable, a United States court of any territory) to enjoin such activity, or to enjoin the person from concealing, removing, encumbering, or disposing of assets which may be required in order to pay a civil monetary penalty if any such penalty were to be imposed or to seek other appropriate relief.

(l) Liability of principal for acts of agent

A principal is liable for penalties, assessments, and an exclusion under this section for the actions of the principal's agent acting within the scope of the agency.

APPENDIX D

Transcript of Oral Argument
Held December 10, 1993
Before Newman, Chief Judge,
Oakes and Cardamone, Circuit Judges
(Argument of the Government)

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TIMOTHY L. STERN,	)	
	)	
Appellant,	)	
	)	
v.	)	**No. 93-4100**
	)	
DONNA E. SHALALA, Secretary of the United United States Department of Health and Human Services, and her delegate, Bryan B. Mitchell, Principal Deputy Inspector General,	)	
	)	
Appellee.	)	
_____	)	

TRANSCRIPT OF ORAL ARGUMENT
HELD DECEMBER 10, 1993
BEFORE NEWMAN, CHIEF JUDGE,
OAKES AND CARDAMONE, CIRCUIT JUDGES

(ARGUMENT OF THE GOVERNMENT)

HOYLE: Good morning, Your Honor. My name is John Hoyle, Department of Justice. I represent the respondent Secretary of Health and Human Services in this case. The administrative process here determined that Dr. Stern submitted 687 claims for Medicare services that he knew, had reason to know, or should have known were not provided as claimed. Now far from being just a question of documentation or misunderstanding or lack of documentation, the administrative judge found that Dr. Stern advertised himself and brought in patients on the basis that he was going to provide acupuncture or electro acu-

puncture. But that he knew that electro acupuncture or acupuncture services were not covered by Medicare, and therefore he submitted claims to the Medicare system that showed services that were not provided, as being provided, so as to disguise the fact that he was really providing acupuncture or electro acupuncture services.

NEWMAN,J: Well now, didn't the prior ALJ find to the contrary?

HOYLE: The prior ALJ, Your Honor, was just in a proceeding for a mandatory exclusion based on a criminal conviction. He pled guilty to seven counts. Those seven counts were not at issue in the CMPL.

NEWMAN,J: And that carried a five year minimum?

HOYLE: That carried a five year minimum.

NEWMAN,J: And the government had the choice of accepting that and moving on to the civil phase, but instead it elected to go forward and seek a twenty year exclusion, right?

HOYLE: Well, I would differ a little bit with that, Your Honor.

NEWMAN,J: That's not what happened?

HOYLE Well, what happened is there is a, a mandatory exclusion and the minimum period can be five years or it can be more than five years. The government, based on aggravating factors . . .

NEWMAN,J: Yeah.

HOYLE: asked for a penalty of twenty years.

NEWMAN,J: And wasn't the aggravating factor the fact that in the government's view this man knew these claims were, were not covered?

HOYLE: Well, there were a number of aggravating factors, Your Honor. The, the, this is a summary proceeding.

NEWMAN,J: Well was that one of them?

HOYLE: This is like a sentencing or a sanction type proceeding, and the judge has just got to determine, the administrative judge has just got to determine what's the appropriate exclusion. Exclusions are remedial, of course. Under all the case law an exclusion of a doctor under

this mandatory proceeding is a remedial sanction to protect the patients of Medicare, and it's done immediately after the criminal conviction in order to get that done very quickly.

NEWMAN,J: Well, you're not suggesting the government was caught unawares here, are you, that it was so quick that you didn't have a chance to put on your case?

HOYLE: Well no, but I am suggesting that the issues are very different in the, in the . . .

NEWMAN,J: But the thing you tried to persuade the first ALJ was that he knew his claims weren't covered by Medicare.

HOYLE: That was among the aggravating factors . . .

NEWMAN,J: Right.

HOYLE: Yes, Your Honor, but I suggest to you that what's he's finding is very, is not the same issue because he's only looking as to what's an appropriate sentence, and the CMPL . . .

NEWMAN,J: That's the consequence of his finding, but his finding is that the man didn't know, that it was a fair dispute, isn't that so?

HOYLE: Well that is, that is his explanation as to why he imposes a five-year penalty.

NEWMAN,J: And you tried to persuade him to the contrary.

HOYLE: We did, Your Honor.

NEWMAN,J: So my question is how do you get to do it a second time?

HOYLE: Because I think that what he is considering is very different. In the CMPL case, we have to prove the whole case. 687 other claims, and the seven he was convicted on.

NEWMAN,J: But isn't that what collateral estoppel is always about? A party is ultimately got a different cause of action. That's why in your view it's not res judicata. But if in proving up that other cause of action they come across the same legal or factual issue that they have lost before,

collateral estoppel bars them, isn't that what the doctrine is all about?

HOYLE: Well, I don't think this is an issue in that sense.

NEWMAN,J: It's not a factual issue whether he knew that his claims were not covered by Medicare? It's not a fact question.

HOYLE: That is a question that is considered in the appropriateness of the sentence. But I don't think it is in the same sense. And for instance, in the, in the CMPL case, the standard is "knew, had reason to know or should have known." So the CMPL judge found Dr. Stern liable under all three standards, so he did not have to find that he did have actual

knowledge. The CMPL is violated, all those 687 claims, and he found under each standard, so that the administrative law judge could have properly found Dr. Stern liable under CMPL, finding that he should have known that these claims were improperly submitted.

NEWMAN,J: Well, isn't even that finding contrary to the first finding? The first finding was, it's a matter of reasonable dispute.

HOYLE: Well I, I just don't think that first judge, when he's trying to determine the, the ALJ, an appropriate sentence, is making the specific statutorily required findings that were necessary in the civil monetary penalties law. He doesn't have to really,

in the mandatory exclusion . . . you know, he's just, what's the best exclusion here, under all the facts, what do I find as an appropriate exclusion. In the CMPL case, he's got statutorily required standards that he has to find, factors he has to find.

JUDGE: You're suggesting these principles don't apply from the one administrative proceeding to the other, the collateral estoppel?

HOYLE: I am suggesting collateral estoppel does not apply.

JUDGE: Because of the nature of the proceeding?

HOYLE: Because of the nature of the proceeding, because the first, cause these specific issues that were very much at issue and for which there was a very long proceeding, the CMPL with live witnesses, lots of written statements as well, and specific findings, couple of hundred specific findings on all of these 687 claims. In the mandatory exclusion, there was not a focus on these 687 claims.

NEWMAN,J: Wasn't there quite a focus in the exclusion proceeding on Dr. Stern's state of mind?

HOYLE: There was on his, on his, right, on his general pattern of conduct.

NEWMAN,J: Well, not just his pattern. His state of mind, more precisely whether this submission of claims was done knowing that they were not covered or whether he in good faith believed they were covered and it was a fair dispute. That was the factual issue, wasn't it?

HOYLE: Well, it was a factual issue in the sense of determining an appropriate sentence.

NEWMAN,J: Right, that the consequence was different, but the fact issue was as I have stated it.

HOYLE: It seems to me that if we were talking about a criminal case and someone had been convicted of selling cocaine, and so at the sentencing proceeding the govern-

ment presents lots of evidence about why this man should receive a severe sentence on the severe end rather than at the minimum end. The judge may say lots of things about that, he may conclude that he doesn't believe that the man is quite as bad as the government has portrayed him, or whatever, but it doesn't seem to me in that kind of sentencing procedure that the judge would be making the kinds of factual findings that would have collateral estoppel effect.

NEWMAN,J: Are you saying that collateral estoppel simply doesn't apply from a criminal

proceeding to a civil proceeding? Is that your, your submission?

HOYLE: Well, it would depend upon the type of criminal proceeding. If it was a criminal trial it certainly would.

NEWMAN,J: All right, if it's a criminal sentencing proceeding, doesn't apply, is that your view?

HOYLE: It seems to me that if all we're talking about is the sort of general appropriateness of the sentence, it doesn't apply.

NEWMAN,J: And is there some case law that supports you in that view?

HOYLE: I don't have any cases to that effect.

NEWMAN,J: Uh huh.

HOYLE: It does seem to me that it would be different if he was making, if it was statutorily required in order to get, say sentencing guidelines said to get such and such a sentence, it would certain things would have to be found, that might be a different situation.

NEWMAN,J: All right, how about the plea bargain argument?

HOYLE: Yes sir, Your Honor, in the plea bargaining, the plea agreement itself, as written, specifically states, let me quote, that "Claims of Medicare Program will be determined in a separate civil proceeding and will not be part of the restitution ordered by the Court." The

restitution they are talking about there, ordered by the Court, is restitution to the patients not to the government.

NEWMAN,J: Uh huh.

HOYLE: It seems to me that the first part of that sentence, "Claims to the Medicare Program will be determined in a separate civil proceeding," clearly indicates that something like the civil monetary penalties proceeding is going to take place after the criminal trial. It reserves that.

NEWMAN,J: Well, I think it clearly indicates something is going to be left over. Now the question is what?

HOYLE: Right.

NEWMAN,J: And then, and then you got this letter, from the government, Mr. Geraci or Garache, he writes, who handled the plea, right?

HOYLE: Yes, Your Honor, yes, that's correct.

NEWMAN,J: And he says, "Timothy Stern understands that Medicare will initiate a civil action against him to recover a loss of approximately 190,000."

HOYLE: I think what he's indicating is that that's one of the possible civil proceedings.

NEWMAN,J: Oh, is that what he's saying? That this is one of them?

HOYLE: Well in the very next sentence, in the very next paragraph, he begins talking about the civil monetary penalties.

NEWMAN,J: Yeah, he says, he says, the first sentence says, "That's what Timothy Stern understands, the fellow who pled." Then, the government says, "It would be more appropriate for us to go after him a little heavier."

HOYLE: Well, I think that all the plea agreement says is "civil proceeding." Certainly at the time . . .

NEWMAN,J: And the question is what was that fairly understood by the person who had to tender the plea?

HOYLE: Correct.

NEWMAN,J: And now we've got the government's own statement how it was understood by Dr. Stern.

HOYLE: I don't think that the AUSA intended to say that that's the only thing that Dr. Stern understood. At the time it certainly had, was known in the Medicare community certainly, that the civil monetary penalties proceeding is a widely used proceeding.

NEWMAN,J: You think that this is just a for instance. He's just writing the IG, "Among the things in Dr. Stern's mind is this loss, is this actual loss."

HOYLE: I, I think that that he's saying that there are really two primary possibilities here. A sort of a restitution suit for the $190,000.00. Let me say the $190,000.00

was just a rough estimate that the initial investigation . . .

NEWMAN,J: I understand. But it focuses on actual loss rather than penal sum. That's the key point.

HOYLE: That's correct, Your Honor. But I, I think that what the U.S. Attorney, the AUSA, is saying is there are two primary possibilities here. One is essentially a restitution suit, civil suit. And the second is a proceeding under the civil monetary penalties law.

NEWMAN,J: And he says Dr. Stern understands one of them. But, but I, the government, think it ought to be the other.

HOYLE: He doesn't say, Dr. Stern didn't understand the second, and all I think is that a . . .

NEWMAN,J: Well, oh I see, you want him to say, "Dr. Stern understands that Medicare will initiate a civil action against him to recover a loss of 190, and his understanding is limited to that. That would have done it?

HOYLE: I, I think, the, the real question is what would a reasonable person entering into this plea agreement have understood.

NEWMAN,J: And you don't think the testimony here of the U.S. Attorney sheds a lot of light on what this, on what this defendant understood?

HOYLE: I don't. I think it certainly does, it certainly focuses on that the, that the, Dr. Stern understood the $190,000.00 restitution suit. I think that this is, the Assistant U.S. Attorney had just entered into this plea agreement. If he felt he was doing something other than what the plea agreement allowed, it doesn't seem to me that he would have written a letter like the one you're reading. I mean, it doesn't make sense to me that the Assistant U.S. Attorney . . .

NEWMAN,J: Well on that theory there would never be a successful claim of a violation of a plea agreement, because U.S. attorneys would always be doing only what they

thought they were entitled to do in the first place, but we've got a lot of cases where U.S. attorneys take pleas and then push a little beyond it, and are reined in. So that the fact that the U.S. Attorney thought he could do it can't be the answer.

HOYLE: Well, but I don't think it's the answer either that the U.S. Attorney . . .

NEWMAN,J: And in any event the question is what did Dr. Stern think? Isn't that the question, how did he understand it?

HOYLE: I think how he, how he reasonably understood it, Your Honor. And he had a criminal defense attorney when he took the plea. It was discussed. There's

testimony in the record by the AUSA that he discussed this matter with the criminal defense attorney, I assume Dr. Stern also. He was asked if he specifically talked about the penalties and he said didn't have a specific memory as to whether he did or did not.

JUDGE: But how about the allocation at the time of the taking of the plea at Appendix 303, 304. "And that there are still disputed claims in the amount of $190,000.00 which involved a separate civil case and that is not involved in this plea agreement. Do you understand that?" The defendant, "I do understand." That was the sum and substance

of it when he made his plea that it was $190,000.00. Wasn't it?

HOYLE: Well its again an identification that out there there are disputes, civil disputes about . . .

JUDGE: It didn't say $190,000.00 or maybe a couple hundred thousand more. He said $190,000.00.

HOYLE: Well I think that's correct, Your Honor, and the 190,000 is the amount that they were estimating that was lost, and I think the question is . . .

NEWMAN,J: That's the point. Doesn't that indicate that what everyone in that courtroom understood was being left for the future was the amount of the loss?

HOYLE: I don't think so, Your Honor, I think everyone . . .

NEWMAN,J: Well, then why were they talking about it?

HOYLE: I think everyone in the courtroom understood that they were talking about a loss of $190,000.00 to the Medicare program and that that would be determined in a civil proceeding afterwards, and the question is, would a reasonable person at that point also understand that under the civil monetary penalties law, if the Medicare program is going after you for that $190,000.00, can they also under law impose what the civil monetary law permits? Penalties and assessments.

JUDGE: Wasn't mentioned in the plea agreement or in the allocation.

HOYLE: Well, the plea agreement itself does not mention an amount.

JUDGE: That's true.

HOYLE: The rest, when they were talking about restitution as to the patients there is an amount . . .

JUDGE: That's different.

HOYLE: A maximum and a minimum set. I think off of the written, the written portion, it seems to me, if there were nothing else, I submit, if there were nothing else, the written portion would allow civil monetary penalties proceeding and I agree that there is a question on the allocation,

and my point is on the allocation, what they're identifying is the amount lost, they are not necessarily limiting it to a simple restitution suit. You know, in a suit to recover where you have wrongfully obtained money, it may not be limited just to restitution.

JUDGE: Well, doesn't the United States Attorney's letter also come into play?

HOYLE: It does, Your Honor.

JUDGE: And that means the amount.

HOYLE: Well, I believe that in both those instances he's naming the amount for the same reason, that is, he's identifying the loss. He, but he's not necessarily saying the remedy will be limited to simply

restitution. It does identify the amount here, but there is a statute on the books that says, if you obtain, wrongfully obtain this money, or attempt to obtain this money from the Medicare program, then the amount that the government can recover is not limited to simple restitution.

NEWMAN,J: Do you agree the test in determining the scope of the plea bargain was what the defendant reasonably understood it to provide?

HOYLE: Yes. What both parties reasonably understand, including the defendant.

NEWMAN,J: You mean, if the defendant had one reasonable interpretation and the government had a different one, then what?

HOYLE: Then, the defendant has to have a reasonable, the second proceeding has to be within a reasonable interpretation of the defendant.

NEWMAN,J: Of the defendant?

HOYLE: Right.

NEWMAN,J: And if it is, then that's binding?

HOYLE: Yes. But I would submit it has to be reasonable. I see my time is up. Thank you, Your Honor.

NEWMAN,J: All right then I guess we have heard it all. We will reserve decision. Thank you both.